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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1964

No. 1079

DEAN D. HILL, County Auditor of Clark County, Iowa; GEORGE T. NICKLES, County Auditor of Wayne County, Iowa; and ALBERT DRAKE, County Auditor of Ringgold County, Iowa,
Appellants,

vs.

CHARLES L. DAVIS and ARTHUR J. LEWIS,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

APPELLEES' MOTION TO DISMISS AND OR AFFIRM AND BRIEF AND ARGUMENT IN SUPPORT THEREOF

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APPENDIX I:

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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1964

No.

DEAN D. HILL, County Auditor of Clark County, Iowa; GEORGE T. NICKLES, County Auditor of Wayne County, Iowa; and ALBERT DRAKE, County Auditor of Ringgold County, Iowa,
Appellants,

vs.

CHARLES L. DAVIS and ARTHUR J. LEWIS,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

MOTION TO DISMISS AND/OR AFFIRM

Appellees in the above entitled case move to dismiss the Appeal herein on the grounds that said purported Appeal is not in compliance with the provisions of the Act of June 25, 1948, c. 646, 62 Stat., 28 U.S.C. 1253, upon which appellants rely in total to sustain Jurisdiction of the Appeal, and/or to affirm the ruling of the Three-Judge Court herein inasmuch as the question presented is so insubstantial as not to require further argument.

OPINIONS BELOW

Appellants in their statement of Jurisdiction have set out in their Appendices the following opinions below:

A. Final Order here sought to be reviewed:

Appendix I—Memorandum Opinion and Judgment Entry, both filed January 14, 1964.

B. Earlier Judgment Entry:

Appendix II—Judgment Entry filed May 3, 1963.

C. Earlier Reported Opinion in the same case.

Davis v. *Synhorst*, 217 F. Supp. 492 (S. D. Iowa 1963).

The Memorandum Opinion filed with the Judgment Entry of May 3, 1963.

To these should be added:

D. Memorandum Opinion and Judgment Entry filed March 27, 1964, with reference to the interim apportionment measure enacted by the Special Session of the Iowa legislature and signed by the Governor of the State of Iowa set out in Appendix I herein.

JURISDICTION

Plaintiffs' action is based upon alleged violation of federally protected rights guaranteed by the equal protection clause found in Paragraph 1 of the Fourteenth Amendment to the Constitution of the United States. Jurisdiction was asserted by virtue of 42 U.S.C., Sections 1983 and 1988 and 28 U.S.C., Section 1343 (3) and relief by way of

Declaratory Judgment was asked pursuant to 28 U.S.C., Sections 2201-2202. In short, the action was based upon the teachings of *Baker* v. *Carr*, 369 U.S. 186.

The Three-Judge Court has held several hearings over the past two years and issued several Memorandum Opinions and Judgment Entries, one of which Judgment Entries is the subject of this purported Appeal by three of the twenty defendants who are party litigants. The other seventeen defendants, who are various State and County officials in Iowa, have not joined in the Appeal.

PURPORTED GROUNDS FOR APPELLATE JURISDICTION

A. Nature of the Proceeding

This is a class action brought by plaintiffs on behalf of themselves and other Iowans similarly situated. Defendants are State and County officials performing various duties in connection with conducting elections for members of the Iowa General Assembly. Plaintiffs assert invidious discrimination against them existed by reason of the disparity in their voting rights for members of each house of the Iowa General Assembly.

Plaintiffs sought a Declaratory Judgment on the constitutionality of the Iowa apportionment statutes to be followed by injunctive relief to correct the inequities arising from said unconstitutional statutes if necessary.

The Attorney General of Iowa represented all defendants during the following proceedings:

1. Hearing on Motion to Dismiss which was overruled.

2. Hearing on the merits which resulted in the finding of unconstitutionality of the Iowa apportionment stat-

utes but Judgment Entry of unconstitutionality was withheld pending a state-wide vote on a pending proposed constitutional amendment setting up a new legislative apportionment system (which was ultimately defeated).

3. A subsequent hearing following the defeat of the constitutional amendment to determine what further action was proper by the Three-Judge Court resulting in the Memorandum Opinion and Judgment Entry of January 14, 1964, from which three of the defendants wish to appeal.

Then on March 9, 1964, these three of the twenty defendants filed "Notice of Appeal" of the Judgment Entry of January 14, 1964, through new counsel.

Following this and in response to a motion requesting such action again by the Iowa Attorney General the Three-Judge Court reconvened on March 27, 1964, and took action on three matters then pending in the suit:

a. Approved the interim apportionment plan which had been duly enacted and approved by the Governor (Appendix I).

b. Denied a Stay Injunction urged by the three appellants. (This action was confirmed by Mr. Justice White on April 7, 1964.)

Appellants at this stage were represented by counsel other than the Attorney General of Iowa.

c. Denied a Petition of Intervention by interested citizens asking clarification of the Memorandum Opinion of January 14, 1964.

B. Dates of Judgment and Appeal

The Interlocutory Order sought to be reviewed was made and entered herein on January 14, 1964.

Notice of Appeal to the Supreme Court of the United States was filed by the appellants herein in the United

States District Court for the Southern Division of Iowa on March 9, 1964, some fifty-four days after the entry of interlocutory Order.

C. Statute Which Appellants Erroneously Contend Confer Jurisdiction upon the Supreme Court

Appellants state that "This Appeal is taken pursuant to the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 926, 28 U.S.C., Sec. 1253". See appellants' Statement of Jurisdiction, page 5 (C).

28 U.S.C., Sec. 1253 provides as follows:

> "Direct Appeals from decisions of Three-Judge Courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an Order granting or denying, after notice and hearing, an Interlocutory or Permanent Injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three Judges."

D. Cases Cited by Appellants Do Not Sustain the Jurisdiction of the Supreme Court in This Appeal

Appellants assert that "This is an Appeal from an Order granting, after hearing, *a Permanent Injunction* in a civil action required by law to be heard and determined by a District Court of Three Judges". (See Statement of Jurisdiction, p. 5, emphasis added.)

An examination of the Judgment Entry of January 14, 1964, clearly discloses that no injunction of any nature, interlocutory or permanent, issued in this suit. Consequently appellants are without a *direct* right of appeal to the U. S. Supreme Court under 28 U.S.C., Sec. 1253.

If appellants' cited cases are to support their position there should be cases present in which the Court assumed

jurisdiction under this statute when an injunction was neither granted nor denied.

Taking appellants' cited cases in order, we find:

(a) *Baker* v. *Carr* was a review of a Denial of Permanent Injunction.

(b) *Gray* v. *Saunders* was an Appeal from a Granting of an Injunction.

(c) *Florida Lime and Avocado Growers* v. *Jacobson* involved the dismissal of a Request for Injunction.

(d) *Paul* v. *United States* involved an Appeal where an Injunction had been issued.

(e) *Eicholz* v. *Public Service Commission of State of Missouri* was an Appeal from a denial of Permanent Injunction.

(f) *Parr* v. *United States and Catlin* v. *United States* deal with questions concerning the finality of orders for the purpose of appeal and are irrelevant to the issue being discussed.

Not one of the appellants' cited cases support their position that they may have a direct appeal to this Court. Indeed cases (a) through (e) above reinforce the notion that appeal may be had directly to this Court *only* from the actual *granting or denial of an Injunction* by the Three-Judge Court below. Since the Three-Judge Court below neither granted nor denied an Injunction in this case appellees have no right of direct appeal to this Court.

E. Cases Sustaining Lack of Jurisdiction of the Supreme Court in This Appeal

Appellees submit that the following authorities sustain the position that only orders *granting or denying an Interlocutory or Permanent Injunction* are *directly* appealable. *Public Service Commission* v. *Brashear Freight Lines*, 312

U.S. 621 at 625-626 (1941), and *American Insurance Company* v. *Lucas*, 314 U.S. 575 (1941). See also 6 Moore's Federal Practice, p. 30.

F. If a Direct Appeal Were Applicable, This Appeal Is Untimely

The Judgment Entry on its face is interlocutory rather than final. Since the Judgment Entry is in fact interlocutory the time for appeal under 28 U.S.C. 2101 (b) is 30 days for an interlocutory order. The Notice of Appeal herein was filed on the 54th day after Judgment Entry.

QUESTIONS PRESENTED BY THE APPEAL EITHER ARE OR SHORTLY WILL BE INSUBSTANTIAL

A short review of the main points of the basic Memorandum Opinion of the Three-Judge Court (*Davis* v. *Synhorst*, 217 F. Supp. 492 (S.D. Iowa 1963), indicates no unusual or difficult features to this reapportionment matter.

The Three-Judge Court found as follows:

1. The large disparities in both houses (18-1 in the house and 9-1 in senate) were obviously *prima facie* cases of invidious discrimination.

2. The defendants offered no evidence to justify the large disparities between the representative districts.

3. The methods of amending the Iowa Constitution by the legislature and through constitutional convention are inadequate for relief in matters of reapportionment since a malapportioned legislature is reluctant to reapportion itself and the legislature also has control of the size and make-up of any constitutional convention that might be voted by the people. In one instance, when the people of Iowa voted a constitutional convention the legislature re-

fused to enact the legislation necessary to carry out the people's mandate in this regard.

4. The record is replete with evidence of invidious discrimination against these plaintiffs and others similarly situated, but the Three-Judge Court found it unnecessary to make a finding in this respect since the invidious discrimination was present by the naked numbers involved.

5. The record shows that the history of Iowa prior to the limiting Constitutional Amendments of 1904 and 1928 was one of legislative representation primarily by population. Plaintiffs' Exhibits 3 and 4 detail the comparative population of the legislative districts from the founding of the State through the present time as of the time of each census. Appellees in their Statement of Jurisdiction, p. 11, erroneously allege that there is no such evidence in the record.

Finally the following reapportionment cases are pending before this Court which will answer any marginal question which might still be open in this Case. These cases are:

WMAC, Inc., v. *Simon*, 31 L.W. 2121.

Reynolds v. *Simms*, 208 F. Supp. 341.

Maryland Committee for Fair Representation v. *Tawes*, 31 L.W. 2155.

Davis v. *Mann*, 32 L.W. 3015.

Roman v. *Sincock*, 215 F. Supp. 169.

Lucas v. *Forty-fourth General Assembly of Colorado*, 32 L.W. 2076.

After the decisions in the above cases are handed down any questions presented by this case will be fully resolved.

CHAOS IN GOVERNMENT WILL BE AVOIDED BY AN AFFIRMANCE HEREIN

The Three-Judge Memorandum Opinion of March 27, 1964 (Appendix I herein), outlines substantially what has happened in Iowa since the Judgment Entry of January 14, 1964, from which appeal is taken herein. The Governor has called a special session of the Iowa legislature which in turn has adopted an interim reapportionment statute which was acceptable to the Governor and sixteen of the defendants in this litigation.

The three defendants appealing are County Auditors in three of Iowa's smallest Counties. It is difficult to imagine any hardship to these three County Auditors if this matter is affirmed.

On the other hand legislative candidates will be nominated in the June 1, 1964, primaries and will stand for election in November of 1964.

If this case should be reviewed, it would throw the residents of the State and the candidates for the legislature in a state of confusion as to whom the duly elected legislators should be and what districts should be in effect for the January, 1965, Iowa legislature.

On the other hand, if there is an affirmance the interim legislature can in due time enact constitutional amendments for legislative apportionment for ultimate submission to the people of Iowa for approval as provided in the Iowa Constitution.

CONCLUSION

Appellees submit that appellants have no right to a direct appeal herein since the Three-Judge Court abstained from either granting or denying injunctive relief, and in the alternative, appellees maintain that since the Judgment appealed from was interlocutory that the Notice of Appeal was untimely filed.

Finally, if a direct appeal were applicable no useful purpose would be served by a review herein inasmuch as there are no substantial questions herein and any possible marginal question will be answered by reapportionment cases already argued to this Court.

Respectfully submitted,

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May, 1964

APPENDIX I

Memorandum and Judgment

Before VAN OOSTERHOUT, Circuit Judge,
STEPHENSON and McMANUS, District Judges

Defendants, appearing by the Attorney General of Iowa, request a determination of whether the apportionment statute entitled Senate File 1 recently enacted by the 60th General Assembly of Iowa, convened in special session February 24, 1964 and signed by the Governor of the State of Iowa, meets Federal Constitutional standards. Prior to enactment of this apportionment statute serious malapportionment existed in the Iowa General Assembly. 27.4% of the population of Iowa elected a majority of the members of the House of Representatives. The maximum disparity in population between representative districts was 18 to 1 (taking into consideration the largest county had 2 representatives). 35.6% of the population elected the majority of the members of the Senate. The maximum disparity in population between senatorial districts was 9 to 1. *Davis* v. *Synhorst*, 217 F. Supp. 492 (1963). This Court held that certain provisions of the Constitution of the State of Iowa and statutes enacted pursuant thereto were invidiously discriminatory and prospectively invalid as to all future elections to the General Assembly of the State of Iowa. This Court abstained from taking further action pending possible action by a Special Session of the General Assembly. *Davis* v. *Synhorst*, 225 F. Supp. 689 (1964).

In Senate File 1 the malapportionment in both houses of the General Assembly has been materially reduced. Approximately 48.3% of the population can elect a majority